

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

RICKY RUSH)	
Claimant)	
V.)	
)	Docket No. 1,054,752
GENERAL MOTORS, LLC)	
Self-Insured Respondent)	

ORDER

Claimant requests review of the January 5, 2015, Post-Award/Preliminary hearing Order entered by Administrative Law Judge (ALJ) Kenneth J. Hursh.

APPEARANCES

Michael R. Wallace, of Shawnee Mission, Kansas, appeared for the claimant. Sharon L. Ivy, of Kansas City, Missouri, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has adopted the same stipulations and considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing from December 31, 2014, with exhibits attached and the documents of record filed with the Division.

ISSUES

The ALJ stated "This preliminary record showed the claimant's present symptoms are the result of natural aging rather than the January 25, 2011 work accident"¹. The ALJ then determined that, because the version of K.S.A. 44-508, in effect before May 15, 2011, states injuries that are the result of natural aging are not employment-related injuries, the request for additional medical treatment for the left knee was denied.

The claimant appeals arguing the order should be reversed. Claimant contends the ALJ erred in denying post-award medical treatment as there is no support in the record for the ALJ's conclusion that the injuries sustained by claimant are simply the result of natural

¹ ALJ Order at 2.

aging and not employment related injuries. Claimant requests post-award medical treatment for his left knee.

Respondent argues the Order should be affirmed.

The issue on appeal is whether claimant is entitled to post-award medical treatment for his left knee.

FINDINGS OF FACT

Claimant suffered injury to his left knee on January 25, 2011. Claimant testified his knee simply buckled and his leg gave out as he was walking. He had pain on the inside of his knee and swelling. He went to plant medical where Dr. Cheng provided ibuprofen, an ice pack and heat pack, and he was instructed to keep his knee elevated. Claimant was sent for an MRI, after which respondent denied further treatment. Claimant then sought treatment on his own.

Claimant met with Prem Parmar, M.D., on several occasions and underwent a left knee arthroscopy with partial medial meniscectomy on April 5, 2011. On October 11, 2011, Dr. Parmar found claimant to have a 5 permanent partial left lower extremity impairment. On November 21, 2011, Daniel D. Zimmerman, M.D., wrote claimant had a 20 percent permanent partial impairment to the left knee.

This matter was resolved by an agreed Award on February 6, 2012, and claimant returned to full duty. The Award left future medical treatment open either by agreement of the parties or upon application to the Director, pursuant to K.S.A. 44-510k. Claimant testified that, after his return to work he went to plant medical for ibuprofen and ice packs, as needed. This alleviated claimant's knee pain.

In August 2014, claimant started having new complaints of pain, discomfort and swelling in the lower inside of his left knee. At one point, while walking at the plant, his left knee "just buckled".² He had an MRI on August 26, 2014, which showed tricompartmental left knee joint osteoarthritis, a degenerative tear of the medial meniscus, a small joint effusion, a small Baker's cyst and a small cyst along the posterior medial joint line.

In August 2014, claimant met with Dr. Parmar for a cortisone injection in the left knee, and was sent for physical therapy. Claimant reported the injection lessened the pain, but did not completely alleviate it. Claimant was presented with two options, another arthroscopy or just live with the symptoms.

² P.H. Trans. at 7.

On September 12, 2014, claimant met with board certified orthopedic surgeon, Christopher A. Bagby, M.D., with a complaint of left knee pain. Dr. Bagby ordered x-rays and, after reviewing an MRI, opined claimant had significant left knee tricompartmental degenerative changes. There was discussion of anti-inflammatory medication, bracing, injections and surgery. Claimant elected to start with a medial unloader brace to see how that worked.

Claimant met with orthopedic surgeon, Alexandra Strong, M.D., on December 23, 2014, for an examination. Claimant reported an increase in his workload caused his knee to buckle and he started limping. Claimant was examined and found to have osteoarthritis of the left knee. Dr. Strong also reviewed the MRI and noted complex tearing of his medial meniscus and degenerative changes throughout the knee.

Dr. Strong opined she did not believe claimant's current complaints were causally related to the 2011 work injury. She did not believe claimant's work activity aggravated, accelerated, or intensified the left knee condition. She noted claimant had no history of any injury since 2011. Dr. Strong wrote that, at the time of the 2011 injury and surgery, claimant clearly had advanced degenerative changes. Finally, Dr. Strong opined claimant's preexisting and underlying osteoarthritis were the cause of his current symptoms.

At the December 31, 2014, post-award preliminary hearing, claimant continued to have pain and discomfort in his knee, with minimal swelling. This pain, discomfort and swelling are in the lower inside of claimant's left knee.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.³

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.⁴

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.⁵

³ K.S.A. 2010 Supp. 44-501 and K.S.A. 2010 Supp. 44-508(g).

⁴ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

⁵ K.S.A. 2010 Supp. 44-501(a).

An injury shall not be deemed to have been directly caused by the employment where the injury results from normal activities of day-to-day living.⁶

It is undisputed claimant suffered a work-related accident on January 25, 2011. That matter was fully litigated and resolved by an Agreed Award on February 6, 2012. The injury suffered in 2011 involved a left knee arthroscopy with a partial medial meniscectomy.

Claimant's current conditions involve tricompartmental degenerative changes with a degenerative tear of the medial meniscus. The only causation opinion in this record is that of Dr. Strong, who opined claimant's work activities did not aggravate, accelerate or intensify his left knee condition. Dr. Strong stated claimant's underlying degenerative changes have progressed and the preexisting and underlying osteoarthritis is the cause of claimant's current symptoms.

Uncontradicted evidence, which is not improbable or unreasonable, may not be disregarded unless it is shown to be untrustworthy.⁷

This Board Member finds the Order of the ALJ, denying benefits after determining claimant's present symptoms are the result of the natural aging process is supported by the evidence in this record and should be affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁸ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed. Claimant has failed to prove his current conditions and need for medical treatment stem from an accident which arose out of and in the course of his employment. Claimant's condition is the result of the natural aging process.

⁶ *Johnson v. Johnson County*, 36 Kan. App. 2d 786, Syl. ¶ 2, 147 P. 3d 1091, rev. denied 281 Kan. 1378 (2006); see also K.S.A. 2010 Supp. 44-508(e).

⁷ *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

⁸ K.S.A. 2013 Supp. 44-534a.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated January 5, 2015, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of March, 2015.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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Kenneth J. Hursh, Administrative Law Judge